No. 81356-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

BIANCA FAUST, individually and as guardian of GARY C. FAUST, a minor, and BIANCA CELESTINE MELE, BRYAN MELE, BEVERLY MELE, and ALBERT MELE,

Petitioners,

v.

MARK ALBERTSON, as Personal Administrator for the ESTATE OF HAWKEYE KINKAID, deceased, LOYAL ORDER OF MOOSE, INC., MOOSE INTERNATIONAL, INC., JOHN DOES (1-10) (fictitious names of unknown individuals and/or entities) and ABC CORPORATION (1-10) (fictitious names of unknown individuals and/or entities),

Defendants,

and

BELLINGHAM LODGE #493; ALEXIS CHAPMAN,

Respondents.

FAUSTS' REPLY IN SUPPORT OF PETITION FOR REVIEW

Steve Chance, WSBA #19765
119 North Commercial Street, Suite 275
Bellingham, WA 98225
(360) 676-9700

Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188-4630
(206) 574-6661

James DeZao, NJBA #170288 (admitted pro hac vice)
DeZao & DiBrigida
322 Route 46 West, Suite 120
Parsipanny, NJ 07054
(973) 808-8900
Attorneys for Petitioners Faust

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A. INTRODUCTION

In their answer to the Fausts' petition for review, the respondents Bellingham Moose Lodge #493, Loyal Order of Moose, Inc., and Alexis Chapman (Moose defendants) have raised new issues necessitating a reply. RAP 13.4(d).

B. REPLY

(1) The Moose Lodge Defendants Misstate the Law Regarding Admission of Blood Alcohol Content Evidence

The Moose defendants imply in their answer at 7-8 that RCW 46.61.506(1) relating to the admissibility of blood alcohol content (BAC) evidence only applies to DUI cases. The Moose defendants misstate the law. RCW 46.61.506(1) specifically states that BAC evidence is admissible in civil cases.[1]

(2) The Moose Defendants Misstate the Standard of Review For Judgments As A Matter of Law

The Moose defendants assert a new standard for motions for judgment as a matter of law claiming that a court can choose to disregard the verdict of the jury and only give weight to certain evidence. Answer at 7. This is not the standard under Washington law. In considering such a

[1] The Moose defendants yet again fail to explain the huge quantity of alcohol found in Hawkeye Kinkaid's blood stream upon autopsy. Far from the "two beers" allegedly served to him at the Moose Lodge bar, Kinkaid had a blood alcohol level of .32 at the time of his death and unassimilated alcohol in his gut. Petition at 4-5.

motion for judgment as a matter of law, just like a trial court, the Court of Appeals was obliged to treat the evidence and the inferences from the evidence in a light most favorable to the Fausts as the nonmoving party Petition at 7-8. The Court of Appeals did not do so, effectively treating the inferences from the evidence in this case in the light most favorable to *moving* party. This was error.[2]

(3) The Fausts' Argument on the Constitutionality of RCW 4.56.110(3) Is Not Procedurally Barred

The Moose defendants assert that the Fausts' constitutional argument regarding the judgment interest rate statute, RCW 4.56.110(3) is procedurally barred under the invited error doctrine or RAP 2.5(a). Answer at 17. In its opinion, the Court of Appeals addressed the issue of judgment interest, believing that the constitutionality of that statute was appropriately before it. The Court addressed what it believed was an important issue and did not choose to avoid the issue on procedural grounds.

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[2] In their answer, the Moose defendants insinuate that there was an alternative explanation for Kinkaid's extraordinary intoxication at the time of his death. For example, they claim that Kinkaid was a heavy drinker and could assimilate a great deal of alcohol, answer at 3, and the direction in which he was driving was somehow significant. Answer at 2. None of the Moose defendants' alternative explanations for the accident are relevant. The only question is whether there was evidence to support the jury's verdict. *See*, Petition at 3-6. The Moose defendants' claim that Kinkaid had only "two beers" at the Moose Lodge bar is certainly belied by the fact that Alexis Chapman told Kinkaid's daughter Rainey and Kinkaid's friend Lisa Johnston. that Kinkaid was *drunk* when he left the bar. RP 264-67, 335. This testimony plainly undercuts the notion that Kinkaid, an allegedly heavy drinker, only had two beers at the Moose Lodge bar.

Invited error does not apply here. The Fausts presented the judgment on the verdict of the jury with the post-judgment interest rate *mandated* by RCW 4.56.110(3). They complied with this unconstitutional statute because it was extraordinarily unlikely the trial court would have entered a judgment with anything other than the statutory post-judgment interest rate. The doctrine of invited error prohibits a party from benefiting from an error that party caused at trial, but the benefit must be precisely attuned to the party's conduct. In *State v. Recuenco,* 154 Wn.2d 156, 110 P.3d 188 (2005), *reversed on other grounds, Washington v. Recuenco,* 126 S. Ct. 2546 (2006), this Court held that a defendant who proposed a special verdict form was not barred by the doctrine of invited error from raising an issue as to a missed element of the crime even though the special verdict form lacked the opportunity for the jury to make a finding on the element of the crime. Similarly, the Fausts did not commit invited error by offering the judgment on the jury's verdict with the statutory rate of judgment interest.

RAP 2.5(a) also does not bar consideration of this important constitutional issue. A manifest constitutional error may be raised for the first time on appeal even if the error did not affect plaintiffs' "trial rights." Answer at 17. In *State v. WWJ Corp.,* 138 Wn.2d 595, 980 P.2d 1257 (1999), the issue was whether a fine was disproportionate to the gravity of

the offense and therefore violated the Eighth and Fourteenth Amendments. This is hardly a "trial right," to use the Moose defendants' terminology. No Washington case confines the reach of RAP 2.5(a)(3) to "trial rights," a concept never defined by the Moose defendants in their reply brief, but presumably meaning something to do with the conduct of the trial. *See State v. Mills,* 154 Wn.2d 1, 109 P.3d 415 (2005) (defendant could raise constitutionality of "to convict" instruction that failed to instruct jury on each element of the crime); *State v. Sanchez,* 146 Wn.2d 339, 46 P.3d 774 (2002) (defendants could raise trial court's failure to sentence them according to the plea agreement). Under this Court's decision in *State v. McFarland,* 127 Wn.2d 322, 333, 899 P.2d 1251 (1995), the constitutional error must be manifest, that is, it must be of constitutional magnitude, and it must actually affect a party's rights. The error here meets the *McFarland* test.

This Court properly has the question of the constitutionality of RCW 4.56.110(3) before it.

C. CONCLUSION

This Court should grant the Fausts' petition for review to avoid the injustice of the decision of the Court of Appeals in this case.

Dated this 4th day of April, 2008.

Respectfully submitted,

Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188
(206) 574-6661

Steve Chance, WSBA #19765
Steve Chance, Attorney at Law, P.S.
119 N. Commercial St., Suite 275
Bellingham, WA 98225
(360) 676-9700

James DeZao, NJBA #170288
(admitted pro hac vice)
DeZao & DiBrigida
322 Route 46 West, Suite 120
Parsippany, NJ 07054
(973) 808-8900
Attorneys for Petitioners Faust

DECLARATION OF SERVICE

On said day below I deposited in the U. S. Mail a true and accurate copy of the attached document: Fausts' Reply in Support of Petition for Review, Supreme Court Cause No. 81356-6, to the following:

Steve Chance
Attorney at Law
119 N. Commercial Street
Bellingham, WA 98225

James DeZao
Attorney at Law
322 Route 46 West, Suite 120
Parsippany, NJ 07054

Russell C. Love
Thorsrud, Cane & Paulich
1325 4th Avenue, Suite 1300
Seattle, WA 98101

Paul Esposito
Clausen Miller P.C.
10 South LaSalle Street
Chicago, IL 60603

Original sent by email for filing:
Supreme Court
Clerk's Office
415 12th Street
Olympia, WA 98504-0929

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: April 14, 2008, at Tukwila, Washington.

Paula Chapler, Legal Assistant
Talmadge/Fitzpatrick